No. 3926

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY KOCKOS and ANDREW KOCKOS, copartners doing business under the firm name and style of Kockos Bros. and Kockos Bros. (a partnership),

Plaintiffs in Error,

vs.

C. ITOH & CO., LTD. (a corporation),

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

BROWNSTONE & GOODMAN,
Attorneys for Defendant in Error.

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Plaintiffs in error have made no attempt to enlighten the court on the facts in this case, for the very good reason that a mere statement of the facts would show that the appeal in this case is utterly without merit.

Facts of the Case.

A rather brief statement of the facts in this case together with the references to the instructions given by the trial court, will be sufficient to indicate to this court, that there really is no question of law involved in the case whatever, but that it is purely

one of fact which the jury found and indeed anyone reading the testimony would find, in favor of the defendant in error.

Itoh & Co., Ltd., hereinafter referred to as Itoh, is a corporation engaged in the import business and having an office in Seattle, Washington. On November 29, 1919, Itoh made a contract with Kockos Bros., plaintiffs in error, hereinafter referred to as Kockos, wherein Itoh sold to Kockos one hundred tons of Chinese shelled peanuts, the contract providing that the subject of the contract was: "Chinese Shelled Peanuts, 40 count (Average)." The contract further provided "Seattle Chamber of Commerce Certificate of Inspection final as to Crop, Count, Quality and Condition." (Page 28, Transcript.)

Before we can understand this controversy, it is necessary to find out what the subject of the contract was, namely, what is meant by the words "Chinese shelled peanuts, 40 count (average)". The meaning of the words "Chinese shelled peanuts" is quite clear, but what is meant by "40 count average" is unintelligible without explanation, and considerable testimony was introduced to show what was meant by this term.

It seems that peanuts are sold to some extent by size, the larger the peanut the more valuable; and the size is determined by the number of peanuts to the ounce; that is, an ounce of peanuts is weighed out, and the number of nuts is counted, and they are usually designated then as 28-30, 30-32, 32-34, 34-36,

and 38-40, meaning in each case, that there are 30 to 32 nuts to the ounce, or 38 to 40 nuts to the ounce, as the case may be. The testimony further showed that the large size nuts, 28-30 and 30-32, are used for salting and in candies, whereas the smaller sizes, such as 36-38 and 38-40 are used for grinding, for peanut butter and other uses, and that there is no difference between the use of a 36-38 nut and a 38-40 nut, except that a 36-38 will usually bring a little better price than a 38-40. In this case the testimony showed that 20 tons of the peanuts were 38-40, and eighty tons were 36-38. To be more accurate, eighty tons averaged, according to the Chamber of Commerce certificate, 37.6 nuts to the ounce, a very small fraction larger than what would be termed 38-40 count. The court will observe, however, that the term used in the contract is 40 count average, and the testimony of all the expert witnesses for plaintiff was that a 40 count average meant anything less than 40 count. The following witnesses testified that the peanuts actually offered for delivery were a good delivery, and came within the meaning of 40 count average, as understood in the trade.

George B. Graham, who made an inspection of the nuts for plaintiff in error, said:

> "I considered the count of thirty-seven good delivery on a 40 count contract because they were larger than called for by the contract. Up to that time I never heard of rejection of peanuts because larger than called for. Since then I have heard of such rejection. The 37 count is one peanut per ounce larger than the

38/40. I never heard of objections to larger nuts except when the market was falling."

(Page 64, Transcript.)

Arthur E. Campbell, who was connected with A. U. Pinkham & Company, Importers and Exporters, said:

"The 36/38 peanut was about 25 cents per hundred higher than 38/40's during this period. I do not believe there is any difference in the utility in the trade between 36/38's and 38/40's. They can be put to practically the same uses. The difference is between the large sizes 28/30's and 30/32's and the small 36/38's and 38/40's. A premium is paid for the larger nuts."

(Page 72, Transcript.)

Adrian H. De Young, manager of the National Importing & Trading Co. of Seattle, who had purchased these very same nuts from Kockos, said:

"In March 1920, the Chicago office of the N. I. & T. Co. told us to inspect the shipment. Kockos Bros. notified us that Itoh & Co. would give us the inspection order. We turned the order over to the Chamber of Commerce who made the inspection. I remember there were two lots, the smaller lot counted 38/40, and the balance 36/38 to the ounce. The nuts were in good condition, free from foreign matter or bugs of any kind, neither were they rancid nor did they carry an excessive amount of splits. I am familiar with the trade custom throughout the United States with regard to peanuts. When a contract calls for 40 count any peanut that is equal to 40 nuts per ounce or a larger sized peanut which would count less than 40 to the

ounce would be a good delivery under such a contract according to trade custom."

(Page 74, Transcript.)

M. J. Collum, witness for defendant in error, testified:

"I have bought and sold Chinese shelled peanuts extensively in this and other markets. A 38-40 count means an average of 38 to 40 peanuts to the ounce. A 36-38 count means 36 to 38 peanuts to the ounce, etc. There is very little difference between 38-40 and 36-38, this can hardly be detected except by actually counting them. There is practically no perceptible difference to the eye between the two. The only way to determine the difference is by an actual count of the kernels."

(Page 76, Transcript.)

"I would say a 38-40 or a 36-38 count would be a good delivery under a contract calling for a 40 count average. Such is the general understanding of the trade. We prefer the 36-38 because it is a better peanut."

(Page 77, Transcript.)

H. W. Seaman, a witness for defendant in error, testified:

"I have been in the importing business for four years in the Oriental import department of W. R. Grace & Co. I handle many thousand tons of peanuts and am familiar generally with the prices of Chinese shelled peanuts during the year 1920 on the Pacific Coast. * * *

I am familiar with the various counts of peanuts. It is generally accepted and understood

in the trade that a delivery of a lesser count is good under a contract calling for a 40 count."

(Page 79, Transcript.)

Arthur Rude testified for defendant in error as follows:

"I have been in the importing and exporting business for six years, formerly as vice-president and manager of Nuzaki Bros., Incorporated, now for myself. * * *

It is generally understood in the trade that a delivery of 36 to 40 would be a good delivery under a contract calling for 40-count average."

(Page 80, Transcript.)

J. S. Courreges, witness for the plaintiff in error, said on cross-examination:

"A 36-38 peanut is as good as a 38-40 peanut and can in many respects be used for the same purposes. I believe I have sometimes received 36-38 count on a 38-40 contract and have, I believe, sometimes delivered 36-38 count on a 38-40 contract."

(Page 89, Transcript.)

A. Schuman, for the plaintiff in error, gave testimony similar to that of Courreges, on cross-examination:

"I do not recall of any instance of anybody objecting to a delivery of 36-38 peanuts on a 38-40 contract, except the market was falling."

(Page 91, Transcript.)

The defendants introduced no other witnesses to testify to what was meant by 40 count average, and I think that an examination of the testimony in this case on that particular point is conclusive, that

40 count average is satisfied by a delivery of peanuts such as were delivered in this case, of which twenty tons were 38-40, and 80 tons averaged 37.6.

All the witnesses united in saying there was no such thing as a forty count peanut as such, nor would a delivery, any part of which would exceed 40 to the ounce such as 39-41 be a good delivery under such a contract. All the witnesses agreed that a forty count average meant a count less than forty. Andrew Kockos, one of the defendants, claimed that a 38-40 peanut would comply with the contract but a 36-38 would not. (Page 109, Transcript.) His testimony as a whole is entirely unworthy of belief.

Prior to the time that these nuts arrived in Seattle, Kockos resold them to the National Importing and Trading Co., Inc., which had a branch office in the City of Seattle. On March 2, 1920, Itoh wired to Kockos at San Francisco, advising them that the peanuts had arrived that day, and asked for shipping instructions. (Page 33, Transcript.) In reply to this wire and on March 10, 1920, Kockos requested O'Callahan-Graham Co., importers and brokers at Seattle, Washington, to inspect the shipment. George B. Graham of the firm of O'Callahan-Graham Co., made the inspection and on March 10, 1920, sent the following wire to Kockos Bros.:

"Exhibit 29.

March 10, 1920.

Kockos Bros.
46 California St.,
San Francisco, Cal.

Examined to-day two lots China shelled peanuts totaling hundred eight tons per your wire

fifth Itoh shippers Sixteen hundred bags Ex Eastern Victor marked diamond ITC actual count thirty-seven sound clean evenly graded free from mold dirt or works Excellent condition Exceptionally good delivery on forty count Contract lot five hundred sixty sacks Ex Eastern Ocean marked three stars Actual count thirty-nine clean free from works webs or dirt Average two nuts slightly moldy out of six hundred twenty five May not increase but dont like even slight trace Advise if want samples.

Collect

O'Callahan Graham Co."

(Pages 63-64, Transcript.)

In reply to that telegram Kockos sent the following wire to O'Callahan-Graham Co.:

"Exhibit 30.

San Francisco, USA March 12, 1920.

Messrs. O'Callahan-Graham Co.,
Seattle, Wash.

Gentlemen:

We have received your wire of March 10th giving us full information in regard to inspection of 100 tons peanuts to Itoh & Company which information was very clear to us and we thank you for your prompt inspection and answer.

We will communicate with you from time to time to give you some of this business, and in the meantime if you are interested in buying anything, kindly let us hear from you.

We remain,

Yours very truly,
Kockos Bros.,
By Andrew Kockos,
Import & Export Dept."

AK:MD.

(Page 65a, Transcript.)

About the same time, to-wit, about March 12, 1920, the National Importing and Trading Co. at the request of Kockos Bros. had the Chamber of Commerce make an inspection of the peanuts and the inspection certificate of the Chamber of Commerce was delivered to the National Importing and Trading Co.

On March 15, 1920, Itoh again wired Kockos (plaintiff's Exhibit 9, page 36, Transcript), asking for shipping instructions, and advising them that unless shipping instructions were received, the shipment would have to be placed in storage.

On March 17, 1920, and after Kockos Bros. had been advised by O'Callahan Graham Co. of the exact condition of the peanuts (plaintiff's Exhibit 29, page 63, Transcript), Kockos Bros. sent the following wire to Itoh:

> "SA San Francisco Cal Mar 17 20
> C. Itoh and Co.
> Central Bldg Seattle
> Ship hundred tons peanuts Kockos brothers Chicago Notify Natl Importing Trading Co Phone them They probably will change shipping instructions This satisfactory to us Advise.
>
> Kockos Bros."

(Plaintiff's Exhibit 11, page 37, Transcript.)

After the receipt of this wire, just set forth, Kockos conferred with the National Importing & Trading Co. and received shipping instructions which were confirmed by a letter (plaintiff's Exhibit 12, page 38, Transcript), in which, among other

things, the National Importing & Trading Co., by A. H. De Young, vice-president, said,

> "We further wish to confirm the writer's conversation with you today, in which we instructed you to ship one hundred (100) tons Chinese Shelled Peanuts, on which we have Chamber of Commerce certificates. You are to ship, notify National Importing & Trading Co., 30 No. Dearborn St., Chicago, Illinois, cars to go to Sibley Warehouse, Clarke Street Bridge."

The record in this case shows that the Chamber of Commerce certificates were procured by the National Importing & Trading Co. on March 15, 1920, so that at the time the order was given to Itoh to ship these peanuts, both Kockos and the National Importing & Trading Co. knew their exact condition.

The record shows without contradiction that about March 15, 1920, the peanut market started to break, and after that time there was a rapid decline in the price of the same. These peanuts reached Chicago in due course, but evidently the National Importing & Trading Co. were in financial difficulties, because in May they were taken over by a committee of creditors, and subsequently they were adjudged bankrupt (page 75, Transcript), and therefore refused to accept the peanuts.

After the peanuts were shipped, Itoh drew a draft against Kockos for the purchase price thereof, and the same was sent to San Francisco for payment.

These documents arrived in San Francisco about March 30th, whereupon Kockos wired Itoh, saying the peanuts were not the exact count which they

bought, and they desired a reduction in price. On April 1, 1920 (page 49, Transcript), Itoh wired Kockos, refusing to give any price reduction, and stating that they understood that the present difficulty had nothing to do with the grade of the nuts in question. On April 6, 1920 (page 49, Transcript), five days later, Kockos again wired Itoh refusing to accept. On April 9, 1920, Itoh, wired Kockos as follows:

> "Seattle, Wash., April 9, 1920.
> Messrs. Kockos Bros.,
> 40 California St.,
> San Francisco, Cal.
> Your wire sixth referring your purchase sixteen hundred bags peanuts inasmuch as you were aware some six or eight days before giving us instructions that peanuts were of a higher count than thirty eight forty we feel that the matter of price should be submitted to arbitration you to name one arbitrator we one and the two one making arbitration board of three. Will you name your arbitrator.
> C. Itoh & Co. Ltd."
>
> (Page 50, Transcript.)

Again on April 13th Itoh wired Kockos as follows:

> "F Seattle was 535 P 13.
> Kockos Bros.,
> 40 California St., San Francisco, Calif.
> Our position is that contract November twenty-eight, nineteen nineteen, for one hundred tons Chinese peanuts have been fully performed by us, and in addition that both yourselves and your buyer National Importing Trading Company had inspected and passed peanuts previous to giving us shipping instruc-

tions Stop Our telegraphic offer April ninth of arbitration has been ignored by you Stop Therefore unless you promptly honor drafts we will have no alternative except to dispose of the peanuts for your account and bring action against you for all loss sustained. Must have reply within forty eight hours.

C Itoh and Co Ltd."

(Page 51, Transcript.)

On April 15th, Kockos replied to Itoh as follows:

"19 SF 74 NL
San Francisco, Calif., 714
Messrs. C. Itoh & Co.,
Seattle, Wash.

Your wire thirteenth received. As per previous communications we have been able ready and willing to confirm our contract and accept documents according to terms of contract but you have absolutely failed to comply as your certificate self explains Stop We understand from the documents you have presented us there was a portion forties and if there is present documents immediately and if they are in order we will take up draft at once

Kockos Bros."

(Page 51, Transcript.)

Thereafter the peanuts arrived in Chicago, and were sold.

There are only two questions involved in this case. The first is, Did the peanuts offered for delivery come within the definition of a 40 count average? If they did, that is an end of this case. The proof was conclusive, that the peanuts offered for delivery were such as were described in the contract.

The second point involved is whether or not there has been a waiver, conceding for the sake of argu-

ment, that a portion of the nuts were not forty count average, on the part of Kockos in accepting these peanuts, and ordering them shipped, after both they and their purchaser had full knowledge of their actual count.

Both of these questions are purely questions of fact, and they were determined by the jury adversely to plaintiff in error. The court, in charging the jury, said,

> "The defendant admits the execution of this contract; and it also admits that it declined to accept the peanuts which the plaintiff tendered to it; the defense being that the nuts were not the 40 count average size, that being the only defense. In such case the burden is upon the plaintiff to show, by a preponderance of the evidence, that it tendered substantially what the contract calls for, or, if it did not tender precisely what the contract calls for, that the defendant waived its right to reject the offer, and in fact accepted the tendered article in fulfillment of the contract.
>
> Generally speaking, I have to say to you that a party to a contract cannot, and the plaintiff here could not, tender something other than the precise thing called for by the contract, claimed to be as good, or better, and demand the acceptance thereof. It must tender what it contracted to deliver unless, as already suggested, the defendant, with full knowledge of the facts, waives the objection and accepts the substituted article as a fulfillment of the obligation of the other party to the contract. As you have heard here, the contract calls for a 40 count average. Some testimony was admitted as to the custom of the import trade in peanuts, the wholesale trade, of the meaning of this phrase as the same is understood by men engaged in

the trade. This testimony, gentlemen, was not offered or received for the purpose of changing the contract, or justifying you or me in changing or altering the contract, or relieving either party from the obligation thereof, but merely to assist us in determining what the contract is, and whether the peanuts tendered by the plaintiff were within the terms thereof as the same was understood and entered into by the parties. In other words, this testimony was received for the purpose of throwing light upon the meaning of this phrase, not of changing it or modifying it in any way, but of finding out what its meaning was, for the purpose of finding out what the parties really agreed upon and what their contract and obligations were.

It is conceded by the defendant that, as such a contract, or such a phrase, is understood in the trade, it is not necessary that the nuts average precisely 40 to the ounce, but that 38-40 as they are called, would be regarded as meeting the requirement, or the demand, of such phrase. And the defendants further contend that any larger nut than 38's would be beyond the meaning of this phrase, or be without its meaning, and, hence, would not meet the requirements. The plaintiff, on the other hand, contends to the contrary, and has introduced witnesses whose testimony tends to show that the count 40 average is understood in the trade to be only a limit to the smallness of the nuts; and that under such a contract it is the common understanding and custom that a slightly larger nut is deliverable; and that not only 38-40's but that 36-38's are deliverable, and are customarily delivered and accepted under such a contract as being in fulfillment thereof. There is that difference, you will see, one party contending that 38-40's fulfilled the contract, and the other party, the plaintiff, contending that not only

> 38-40's would fulfill it, as is the common understanding, but that even a slightly larger nut, a 36-38, would be regarded as complying with the terms. It is for you to say upon which side of this particular issue the truth lies. If, from the evidence, you believe that, under trade customs and practice, the parties, when they entered into this contract, intended and understood that it called for a 40-count average, and that it was merely a limit upon the smallness, that it couldn't be smaller than 40, and that it would be satisfied by 38-40's, and also 36-38's, a slightly larger nut, then you will find for the plaintiff, for, in that contingency, it is submitted that the plaintiff tendered such a nut as was called for by the contract, that is, upon the assumption that it means 36-38's as well as 38-40's."
>
> (Pages 113-115, Transcript.)

We have already called the court's attention to the fact that when Kockos ordered these nuts shipped to Chicago, and told Itoh to accept the directions and instructions of the National Importing & Trading Co. Kockos knew the exact count of the nuts, as did also the National Importing & Trading Co., who had theretofore received the Chamber of Commerce certificates. On this branch of the case the court charged the jury as follows:

> "If, upon the other hand, you find that the 36-38's did not meet the clause of the contract as it was understood by both parties when it was entered into, and by the custom and practice of the trade, to which I have adverted, then you will consider plaintiff's contention of a waiver and acceptance by the defendant, for one party to the contract, that is, the purchaser

> under a contract, who has the right to demand goods of a certain class or quality, may waive some defect or objection upon that ground and accept the goods of a somewhat different type or quality, in fulfillment of the contract. You have heard the testimony upon this point, and the discussion of counsel, tending to illuminate it; and you will say whether or not, with knowledge of the facts, the defendant did in fact waive such objection, if any there might be upon this ground, and did in fact accept the tendered nuts as being in full compliance with the obligations of the plaintiff to deliver under the contract. If you find that such an acceptance was in fact and intelligently made, then the defendant would be bound just the same as if such nuts were originally agreed upon. If, upon the other hand, you find that there was no waiver and acceptance, and you find that the nuts were not in accordance with the clause of the contract as understood by the parties, then your verdict should be for the defendant, absolutely; but if you find for the plaintiff, under the instructions I have given you, the next question is as to the amount of its damages."
>
> (Pages 115 and 116, Transcript.)

It seems to me that no citations of authorities are necessary to establish the elementary principles of law involved in this case. Obviously no testimony was introduced to change or vary the meaning of this contract. Testimony was simply introduced to explain the meaning of a phrase which would otherwise be unintelligible. The question of waiver is also elementary. Any person can waive anything for his benefit, and such waiver is always a question of fact.

I shall, however, cite to the court some authorities to sustain the instructions of the court, though it seems to me entirely unnecessary.

PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN A TRADE TERM IN A CONTRACT.

Neither the court, jury or counsel would have known what was intended or meant by the words "40 count average" and therefore it would have been impossible to determine whether or not peanuts in conformity with the contract had been tendered, unless some explanation was made to the court and jury in order to enable them to understand this term. That the law permits such explanation is too plain to admit of argument.

We have examined the matter at some length, and find that there are a tremendous number of authorities on this point, and we therefore think it advisable to cite a few.

The general subject is reviewed in 22 Corpus Juris 262, and in 9 Ency. of Evidence 387.

Judge Bean while a member of the Supreme Court of Oregon and in the case of Barnes v. Leidigh, 79 Pac. 52, says:

> "It is competent, therefore, from their standpoint, to show the meaning of the terms 'merchantable lumber, mill run', as used in the vicinity where the contract was made. These words are not in common use, and have no settled judicial meaning. They are peculiar to the lumber trade or business, and, as the evi-

dence tended to show, have a special meaning, and are well understood by persons engaged in such business. The testimony was therefore important and necessary, in order to enable the court to construe the contract, and the jury to render a proper verdict. 2 Wharton, Ev. (2d Ed.), sec 962; Corneil v. Lumber Co., 71 Mich. 350, 39 N. W. 7; Jones v. Anderson (Ala.), 2 South. 911."

"The defendant Ohsman should have been permitted to testify as to the trade terms used in the old-iron business, and as to what 'mixed cast and forged iron' meant among dealers."

Grasmier v. Wolf, 90 N. W. 814.

"We think that was error. It was the duty of the Court to construe the contract in such a way as to render it operative and effectual to carry out the purpose of the parties, as expressed in the language and terms which they used. As a general rule, the words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; but if they are used in a technical sense, they should be interpreted as usually understood by persons in the profession or business to which they relate; or if they have a special meaning given to them by usage, the meaning should be followed. (Sections 1644, 1645, Civ. Code.) In such a case, evidence explanatory of the words is admissible, not for the purpose of adding to or qualifying or contradicting the contract, but for the purpose of ascertaining it by expounding the language, and so enabling the Court to interpret it according to the actual intention of the parties, and the law, and usage of the place where it is to be performed. (Sections 1636, 1646, Civ. Code.)

Callahan v. Stanley, 57 Cal. 479.

"The parol evidence was properly admitted to explain the signification attached, among persons engaged in the timber business, to the words 'hewn timber, to average one hundred and twenty feet, and to class B No. 1 good'."

Jones v. Anderson, 76 Ala. 428; 2 Southern 912.

"If the terms are only used in a peculiar trade, or service or calling, the meaning must be gathered from the testimony of persons acquainted with the trade, or service, or calling in which the terms are employed, and it is for the jury to ascertain the meaning of the term used."

Long v. Davidson, 101 N. C. 170; 7 Southeastern 758.

See, also, Fuller v. Metropolitan Life Ins., 37 Fed. 163; Buckbee v. Hohenadel, 224 Fed. 14-24.

WAIVER.

As before pointed out the jury were instructed that the defendants in error claimed that there was a waiver by the defendant of any objection to the character of the merchandise.

The contract in this case provided that the merchandise was to be delivered at Seattle, Wash., f. o. b. cars. (Page 28, Transcript.) Immediately upon their receipt in Seattle, Kockos was notified and thereupon procured inspection to be made by O'Callahan-Graham Co. and the latter on March 10, 1920, advised Kockos as follows. (Exhibit 29, page 63, Transcript.)

"March 10, 1920.

Kockos Bros.
46 California St.,
San Francisco, Cal.

Examined today two lots China shelled peanuts totaling hundred eight tons per your wire fifth Itoh shippers Sixteen hundred bags Ex Eastern Victor marked diamond ITC actual count thirty seven sound clean evenly graded free from mold dirt or works Excellent condition Exceptionally good delivery on forty count Contract lot five hundred sixty sacks Ex Eastern Ocean marked three stars Actual count thirty nine clean free from worms webs or dirt Average two nuts slightly moldy out of six hundred twenty five May not increase but dont like even slight trace Advise if want Samples.

O'Callahan-Graham Co."

In answer to that Kockos wired:

"We have received your wire of March 10th giving us full information in regard to inspection of 100 tons peanuts to Itoh & Co. which information was very clear to us and we thank you for your prompt inspection and answer."

The Chamber of Commerce certificate which confirms the report of O'Callahan-Graham & Co. was issued on March 15, 1920, at the request of the National Importing & Trading Co. to whom Kockos had sold these peanuts and after the certificate had been delivered to the National Importing & Trading Co. and on March 17, 1920, Kockos wired Itoh

"ship 100 tons of peanuts to Kockos Bros. Chicago, notify National Importing Trading Co. Phone them. They probably will change

shipping instructions. This satisfactory to us. Advise."

(Exhibit No. 11, page 37, Transcript.)

They had full knowledge therefore of the count of the peanuts and after they knew that the Chamber of Commerce certificate had been prepared and delivered to the persons to whom they sold, they accepted delivery of this merchandise by ordering it shipped from the place where it was to be delivered to them, namely, at Seattle, to Chicago, and it was not until they found out that the National Importing & Trading Co. would not take the merchandise that they tried to run out on their contract. According to their own contention, the merchandise offered for delivery could be used for the same purpose as the merchandise which they contended they were to receive, was of a better quality, and was worth more in the market. They therefore could not possibly have been prejudiced in any way by their acceptance of this merchandise.

Under such circumstances, the jury were instructed to determine whether they had in fact waived any objection on their part, that the count of the peanuts was not what they had ordered. At the time plaintiffs in error ordered this merchandise shipped they had full knowledge of the contract, full knowledge of any right which they possessed, if they did possess any, to refuse to accept delivery thereof. They were not acting under a mistake of fact or of law and had full knowledge of all the conditions surrounding this purchase.

In the case of California S. H. Co. v. Calendar, 94 Cal. 126, the court said:

> "In Fishback v. Van Dusen, 33 Min. 111, Mr. Justice Mitchell, speaking for the court, said: 'Whether there has been a waiver is a question of fact. It may be proved by various species of evidence,—by declarations, by acts, or by forbearance to act.' Other authorities say it is a mixed question of law and fact, but that each case must depend upon its own peculiar circumstances and surroundings. 'It is a question of intention, and a fact to be determined by the triers of fact.' (Okey v. State Ins. Co., 29 Mo. App. 111; Ehrlich v. Insurance Co., 88 Mo. 249; Drake v. Insurance Co., 3 Grant Cas. 325; Witherell v. Insurance Co., 49 Me. 200); 'and though the waiver must be intentional and clearly proven, the sufficiency of the evidence relating thereto is for the jury.'" (Insurance Co. v. Schollenberger, 44 Pa. St. 259.)

At 40 Cyc., 267, we find the following language supported by copious authorities:

> "Waiver is a matter of fact to be shown by the evidence. It may be shown by express declarations, or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage, or it may be shown by a course of acts and conduct, and in some cases will be implied therefrom. It may also be shown by so neglecting and failing to act as to induce a belief that there is an intention or purpose to waive. Proof of express words is not necessary, but the waiver may be shown by circumstances, or by a course of acts and conduct which amounts to an estoppel."

The testimony of waiver in this case is so clear as to amount to legal proof of a waiver. However

the matter was submitted to the jury under appropriate instructions of the court, and it was for them to determine whether the plaintiffs in error had any right to waive and if having such right, they waived it.

We shall also briefly call attention to the points and authorities which have been advanced by plaintiffs in error and shall answer them in the order in which they are presented.

A. There is no dispute about the facts contained in the Chamber of Commerce certificate.

Plaintiffs in error suggest that the Chamber of Commerce certificate is final as to count and is binding upon both parties. We do not dispute this.

Our contention is, first, that the count of the peanuts was in conformity with the contract, and therefore the nuts should have been accepted by plaintiffs in error, in fact, we believe that is clearly shown by the testimony and there is no doubt that the jury so found.

If there be any doubt about that, the plaintiffs in error by accepting the peanuts waived any objection to the count. We are not disputing the facts set forth in the Chamber of Commerce certificate.

B. Plaintiffs in error are not entitled to a nonsuit as to the 1600 bags.

In presenting their claim that the motion for a nonsuit as to the 1600 bags should be granted, plaintiffs in error assume that the 40 count average

means that the peanuts must be 38-40, and that the count of 37.6 did not come within the terms of the contract. The testimony, however, shows that the tender of the count of 37.6 was clearly within the terms of the contract. As before pointed out there was also a waiver which plaintiffs in error do not take into account.

C. Motion for a nonsuit as to the 400 bags was properly denied.

Plaintiffs in error say that the evidence without contradiction shows that 400 bags were 40 count. He means that they were 38-40 count. (See Chamber of Commerce certificate, page 41, Transcript.)

The fact is that there was never any sufficient tender or offer on the part of the defendant to pay for the 400 bags. The peanuts arrived in Seattle on March 2, 1920. On that very day Kockos was advised of their arrival. On the 15th of March, Kockos gave shipping instructions to Itoh, and in compliance therewith the peanuts were shipped to Chicago. On March 30th, drafts were presented in San Francisco to Kockos, for the cost of the peanuts, and on that day, to-wit, March 30th, Kockos wired Itoh asking for a reduction in price. (Page 4, Transcript.) This was immediately refused by Itoh. On April 6th Kockos repudiated the contract and refused to accept delivery. (Page 49, Transcript.) Itoh was entitled to immediately sue for the breach.

Now it seems that plaintiffs in error contend that the breach was waived as to the 400 bags or twenty

tons, and their sole testimony on this point is a telegram sent by Kockos to Itoh on April 15th in reply to a telegram sent by Itoh in which Itoh told Kockos that they intended to sell these peanuts for the account of Kockos. This wire of April 15th is as follows (Exhibit 25, page 51, Transcript.):

"San Francisco, Calif.

Messrs. C. Itoh & Co.,
Seattle, Wash.

Your wire thirteenth received. As per previous communication we have been able ready and willing to confirm our contract and accept documents according to terms of contract but you have absolutely failed to comply as your certificate self explains Stop We understand from the documents you have presented us there was a portion forties and if there is present documents immediately and if they are in order we will take up draft at once.

Kockos Bros."

It is not an offer to say that

"we understand from the documents you have presented us there was a portion 40's and if there is present documents immediately and if they are in order we will take up draft at once."

This is not an unconditional offer or tender nor can we understand what is meant by the words "portion of 40's". There were 400 bags of 38-40 and 1600 bags of 36-38, the latter averaging 37.6.

According to the testimony in this case, and to the understanding of defendant in error, it made no difference whether the peanuts were 38-40 or 36-38. They would still be 40 count average. So that the telegram itself had no meaning.

However conceding for the purpose of argument that the plaintiffs in error did actually offer to accept and pay for 20 tons, they would not have been entitled to have a nonsuit granted as to 20 tons. This contract was an entire contract and not a separable or divisable one. If we made a contract to deliver 100 tons of peanuts we were bound to deliver the whole 100 tons; we could not offer 20 tons or complete the contract partially and leave the purchaser to sue for the breach of the balance of the contract; nor could the purchaser where he had purchased 100 tons of peanuts offer to accept 20 tons of the same, and make the seller sue him for breach of contract for refusal to accept the balance. If this were a contract for instance that provided for the delivery of 100 tons of peanuts; 50 tons sugar; and 10 tons of coffee, it might be separable and divisable as to the peanuts, sugar or coffee; that is, either seller or buyer might deliver or accept delivery, of the sugar, or the peanuts, or the coffee, and partially fulfill the contract to the extent of the delivery of the separate items, but that is only so in a separable or divisable contract.

In the leading case of Norris v. Harris, 15 Cal. 226-256, Justice Stephen J. Field, said:

> "As we have already stated, three of the slaves designated in the instrument of transfer to Norris had been at the time sold, and it appears from the evidence that a deficiency existed in the number of horses and cattle, and hence, it is contended that the plaintiff was under no obligation to accept those which remained, on the ground that the contract was

entire for the whole of the personal property. It is undoubtedly true that an entire contract is indivisable—that the whole must stand or fall together. But a contract, made at the same time, of different articles, at different prices, is not an entire contract, unless the taking of the whole is essential from the character of the property, or is made so by agreement of the parties, or unless it is of such a nature that a failure to obtain a part of the articles would materially affect the objects of the contract, and thus have influenced the sale had such failure been anticipated. In the present case, the contract includes three items—the slaves, the horses and the cattle. As to the slaves the contract is clearly entire. The gross sum is fixed for the whole number, and no means of determining the price for each one is afforded, and hence the agreement is implied that the whole are to be taken or none. (Story on Contracts, sec. 23; Miner v. Bradley, 22 Pick. 459.)"

THE TRIAL COURT DID NOT ADMIT ANY TESTIMONY TO VARY THE TERMS OF THE CONTRACT.

Counsel makes the point that evidence was admitted to vary the terms of the written contract. As before pointed out no such testimony was admitted. The testimony adduced was in explanation of a trade term in the contract.

WAIVER.

We have already discussed the question of waiver. The only criticism that plaintiffs in error make on

this point is that the testimony does not support it. Whether there was a waiver or not was a matter to be submitted to the jury and it was under the instructions of the court so submitted. There is no doubt that this case was decided by the jury squarely upon the proposition that the nuts delivered were such as were contemplated by the contract. It is quite clear that plaintiffs in error believed that position was correct as did the Nat. Imp. & Trading Co. It was only after plaintiffs' in error found out that the National Importing & Trading Co. were going to be unable to fulfill their contract, that they tried to run out on their contract, undoubtedly figuring that if they did accept the peanuts they would have to sell at a loss, and they could be no worse off if they refused to accept them and took their chances on a law suit. If Kockos had accepted these peanuts, he would have had to sell them as did the defendants in error and would have sustained the same loss, namely, the sum of $8500.00. As it was, he saved interest on the amount from the time the sale was made by the defendant in error until the date judgment was rendered which was for a period of over a year, and also took his chances on saving something by the cleverness of his attorneys.

During the trial of this case an amusing incident occurred which serves to show the utter lack of merit in the position of plaintiffs in error. Defendant in error had identified and introduced in evidence a sample of a 36-38 peanut and one of a

38-40 peanut. Plaintiff in error produced two expert witnesses, one, Mr. A. Schuman, who said he might be able to distinguish between a 36-38 and a 38-40 peanut if he had them side by side. The two samples were produced and the following proceedings occurred:

> "The witness was then shown by Mr. Brownstone the two boxes of peanuts, heretofore offered in evidence, the 36/38 count being marked No. 1, and the 38/40 count being marked No. 2, and was asked to examine the two samples, and then to tell which box was 36/38 and which was 38/40.
>
> Mr. BROWNSTONE. Q. Supposing you look at these two boxes of peanuts and tell us whether you can tell one is 38/40 and the other is 36/38 or are they the same? What would be your judgment on it?
>
> A. Offhand I would say that these here (indicating 36/38 box) were the 38/40.
>
> Mr. BROWNSTONE. Well, your guess was wrong. I just want to call the jury's attention to the fact that this is the 36/38."
>
> (Page 91, Trans.)

There was no defense to this action legally or morally and the judgment should be affirmed.

Dated, San Francisco,
March 3, 1923.

BROWNSTONE & GOODMAN,
Attorneys for Defendant in Error.